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FEDERAL COMMUNICATIONS COMMISSION
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JOSEPH REY, et al.,

Plaintiffs,

vs.

GUY GANNETT PUBLISHING CO.,
et al.,

Defendants.

6/9/92/ONE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 90-2554-CIV-MARCUS

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7/22
5013
SEP
(1171)

ORDER OF REMAND

JUN 5 1992

T. G. CHELEOTIS
CLERK U.S. DIST. CT.
S.D. OF FLA. - MIAMI

THIS CAUSE is before the Court on Plaintiffs' Motion to Remand. For the following reasons, the motion is GRANTED.

Plaintiffs commenced this action for specific performance and injunctive relief on November 8, 1990, arising out of a dispute as to whether a contract between the parties provided for exclusive or non-exclusive use by Plaintiffs of certain antenna space atop the Gannett Tower. On June 20, 1991, this Court denied Plaintiffs' Motion for Preliminary Injunction, after a lengthy hearing, concluding that, among other things, at that stage in the litigation, the contract provided Plaintiffs with only non-exclusive use of the antenna slot. On September 27, 1991, the Court issued an Order Denying Plaintiffs' application to amend the findings of fact, but expressly added this caveat:

We observe, however, what is clearly delineated in that Order -- our ruling of June 20th did no more than deny a motion for preliminary injunctive relief. The Court did not consolidate the preliminary injunction hearing, nor was it presented with nor finally did it rule on a motion for final summary judgment filed by any party.

Order of Sept. 27, 1991 (emphasis in original). Plaintiffs were

Federal Communications Commission

Packet No. GC 95-172 Exhibit No. 11

Presented by Rainbow Broadcasting

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Reporter YB

Date 6-28-96

subsequently granted leave to amend the complaint. In their Amended Complaint for Damages and Injunctive Relief, filed November 6, 1991, Plaintiffs have added a claim for money damages arising out the alleged breach of the lease agreement by Defendants Guy Gannett Publishing Co. ("Gannett") and MPE Tower ("MPE"), as well as a claim seeking money damages from both Defendants for fraud or negligent misrepresentation. Specifically as to MPE, Plaintiffs assert that, as a signatory to the lease agreement which underlies the claims for breach of contract, fraud, and misrepresentation, MPE is liable to the same extent as Defendant Gannett.

Plaintiffs now move to remand the action back to state court based on this Court's alleged lack of subject-matter jurisdiction. Specifically, Plaintiffs assert that full diversity of citizenship no longer exists, in that Plaintiffs Joseph Rey and Esperanza Rey-Mehr and Defendant MPE all are citizens of Florida. In response, Defendants argue that MPE is only a formal or nominal party to the lawsuit, that its joinder in the litigation is fraudulent, and that the addition of this party was designed and intended to defeat diversity jurisdiction. We disagree with Defendants' contentions, and accordingly we are constrained to Grant the Motion to Remand as this Court is without subject-matter jurisdiction.

At the outset, we observe that Defendant MPE is indeed, as Defendants must concede, a Florida corporation and therefore a Florida citizen for diversity purposes. See Pl. Mot. to Remand, Ex. 2. Since federal subject-matter jurisdiction requires complete diversity of citizenship between all plaintiffs and all defendants,

see 28 U.S.C. § 1332(a)(1), and since we find such diversity to be lacking here, the only remaining issue is whether Defendant MPE's presence in the lawsuit is the result of a "fraudulent joinder," done merely for the purpose of defeating diversity. In this regard, the United States Court of Appeals for the Eleventh Circuit has held:

In order to establish that a ... resident defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the resident defendant in state court or that there has been outright fraud in the plaintiff's pleading of jurisdictional facts. Both parties may submit affidavits and deposition transcripts. The district court must evaluate all factual issues and questions of controlling substantive law in favor of the plaintiff. If there is even a possibility that a state court would find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that the joinder was proper and remand the case to the state court.

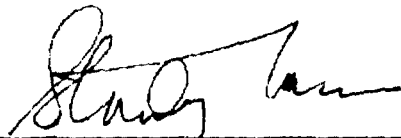
Coker v. Amoco Oil Co., 709 F.2d 1433, 1440-41 (11th Cir. 1983) (emphasis added). Here, Defendants argue that the Court, in denying Plaintiffs' Motion for Preliminary Injunction, has already concluded that no cause of action can be stated against Defendant MPE. We have, however, already observed that our Order of June 20th did no more than deny a motion for preliminary injunctive relief; it did not, nor could it, encompass a final resolution on the merits on Plaintiffs' claims. See Order of Sept. 27, 1991. We are thus unpersuaded by Defendants' primary argument in opposition to the instant motion.

Defendants also assert that, since MPE conveyed its interest in the transmission tower to co-Defendant Gannett in 1989, MPE

cannot be held liable for the subsequent alleged breach of the lease agreement to which MPE is a signatory. We cannot conclude, however, that, as a matter of law, see B., Inc. v. Miller Brewing Co., 663 F.2d 545, 554 (5th Cir. 1981), these facts negate "even a possibility" that a state court may find Defendant MPE liable to Plaintiffs. See 11 Fla. Jur. 2d § 79 (A contract "will be held binding upon those who do sign it.... A party cannot contradict his written contract by showing that notwithstanding he signed it, it was with the understanding that he was not to bound by its terms." (citing Coleman v. State, 174 So. 408 (1937); Bacon v. Green, 18 So. 870 (1895); 94 A.L.R.2d § 691 ("Person who signs contract but is not named in the body thereof [i]s party to contract and liable thereunder."))). We therefore conclude, taking the facts and law in the light most favorable to the Plaintiffs -- as we are required to do -- that there exists the possibility, based on the facts alleged in the Amended Complaint, that a state court could impose liability on Defendant MPE. The joinder of MPE was therefore not fraudulent, and accordingly, it is

ORDERED AND ADJUDGED that Plaintiffs' Motion for Remand is GRANTED.

DONE AND ORDERED at Miami, Florida, this 5th day of June, 1992.


STANLEY MARCUS
UNITED STATES DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

cc: Counsel of record